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Citation: Jamie Grace, Jamie Grace and Oswald, Marion (2021) Submission to the Independent Review of Administrative Law. In: Judicial Review Reform Consultation: The Government Response. HM Government, London, pp. 1-47. ISBN 9781528627931

Published by: HM Government

URL: <https://www.gov.uk/government/consultations/judicial-review-reform>

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Judicial Review Reform Consultation

The Government Response

Date of publication July 2021



Ministry
of Justice

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Ministry
of Justice

Judicial Review Reform Consultation

The Government Response

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

July 2021



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ISBN 978-1-5286-2793-1

CCS0621754360 07/21

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

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Foreword

When I launched the Judicial Review consultation earlier this year, I wanted to spark a debate about the purpose of Judicial Review, its evolution and the reforms that might be needed. The Independent Review of Administrative Law (IRAL) is the foundation for that debate. The IRAL Panel produced an excellent report and I was persuaded by their recommendations, but it seemed to me, having considered the discussion in the report and the submissions to the IRAL call for evidence, that there was a case for going further. I decided to consult on other options.

As was the case with the IRAL call for evidence last autumn, our consultation in March and April elicited a wide range of detailed and thoughtful responses. I said in the consultation document that I wanted the process of Judicial Review reform to be iterative. Analysis of the consultation responses has provided us with a solid basis on which to proceed with a number of reforms, on which we will now legislate, but the Government will continue to think about the way Judicial Review is operating in the round and whether further changes, including the procedural measures on which we consulted, may be needed.

Whilst those who responded to the consultation had a multitude of perspectives on the purpose and place of Judicial Review, a common theme has been that Judicial Review should work hand in hand with the executive and with Parliament in ensuring good public administration.

Within the idea of good administration are several principles. Sometimes, and indeed usually, they are complementary, but at other times they may be in conflict. This is especially so in a court's determination about granting relief. A court needs to not only take into account the rights of the claimant, but also the consequences of granting a remedy, the effects on the rights of others, and the nature and extent of the error to give but a few examples.

I have said that I want to restore the place of justice at the heart of our society by ensuring that all the institutions of state can act together in their appropriate capacity to uphold the rule of law. The reforms to Judicial Review set out in this document will contribute to this by increasing the flexibility of the remedies available to the courts, empowering judges to provide relief in a way which is balanced and attuned to the circumstances of the case. In this way we can strengthen Judicial Review as a means of attaining good, just, public administration.

Giving the courts the option to suspend, remove or limit the retrospective effect of relief, represents a major increase in remedial flexibility. And whilst the discretion of the court is important, and ultimately will always remain, a presumption to give a form of relief which allows the defendant an opportunity to make good an error – where that affords adequate redress – is appropriate. It will ensure Judicial Review is directed at practical solutions.

Another element of these reforms is more structural, namely removing '*Cart*' Judicial Reviews. The IRAL Panel recommended this reform but were criticised by stakeholders who argued that the Panel's evidential basis for the recommendation was flawed. In light of further analysis of the data (explained in the present document) I am satisfied that the Panel reached the right conclusion. The sheer number of challenges per year, the very low success rate, and the stature of the Upper Tribunal mean that *Cart* Judicial Reviews are detrimental to the efficiency and function of the justice system.

The Government is introducing legislation on these measures in the Judicial Review and Courts Bill and I look forward to the debate continuing in Parliament.



Robert Buckland

Robert Buckland
Lord Chancellor

Introduction

1. Judicial Review is the process by which a court reviews the lawfulness of a decision or action made by a public body, specifically looking at how the decision was made, rather than the rights and wrongs of the conclusion reached.
2. The Government's 2019 Manifesto included a commitment to look afresh at Judicial Review. In July 2020, an expert Panel chaired by Lord Faulks QC was established to conduct the Independent Review of Administrative Law (IRAL).
3. The Panel's task was to consider how the legitimate interest of the citizen in being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law.
4. Having conducted a call for evidence from 7 September to 26 October 2020, which elicited well over 200 submissions, Lord Faulks and his colleagues delivered their report to the Lord Chancellor in January 2021.
5. In their report, the IRAL Panel charted developments in Judicial Review over the past half-century. The Panel wrote at length about the diminishing field of non-justiciable areas¹, highlighted the courts' inconsistent approach regarding nullity and reflected on concerns expressed by others around ideas such as the 'principle of legality'². The Panel also pointed out several instances where the courts have not had remedies at their disposal that provide the flexibility they need, and that this hampers the effectiveness of the courts in dealing with Judicial Review cases. The Panel concluded that, in the main, Judicial Review is not in need of systemic reform³, and the answer to any judicial overreach is judicial restraint, something which does not require legislation.⁴
6. The Panel recommended two reforms to substantive law – reversing the *Cart* judgment and introducing suspended quashing orders as an additional remedy – and proposed changes to procedure to be considered and taken forward by the Civil Procedure Rule Committee (CPRC).⁵
7. The Government published the Panel's report on 18 March 2021. On the same day it also published its response in the form of a consultation document, 'Judicial Review Reform - the Government Response to the Independent Review of Administrative Law'. The consultation document indicated that Ministers were minded to take forward the Panel's recommendations. It also, drawing on the IRAL Panel's analysis and submissions to the IRAL call for evidence, sought views on a number of other proposals:

1 IRAL Report, 2.11-36, 2.94-95

2 IRAL Report, 3.29

3 IRAL Report, 2.96, pp.129-130

4 IRAL Report, 3.19-3.22) These are views with which the Government agrees

5 Changes include: removing the requirement for a claim to be issued "promptly", but retaining the 3-month time limit providing further guidance on intervenors providing for an extra step in the procedure of a Reply, to be filed within seven days of receipt of the Acknowledgement of Service.

- legislating to clarify the effect of statutory ouster clauses
- legislating to introduce a discretion to make remedies prospective only
- legislating, in relation to Statutory Instruments, for a presumption, or a requirement for any remedy to be prospective only
- legislating for quashing orders to be presumed or required to be suspended
- legislating to clarify the principles and concept of nullity
- making further procedural reforms (to be considered by the CPRC).

8. The consultation period ran for six weeks, closing on 29 April 2021. During this time, significant stakeholder engagement was undertaken, details of which can be found at Annex D.
9. The Government faced criticism for the length of the consultation period, which ran during the Easter period and over the pre-election period for the Scottish and Welsh elections. It was a shorter consultation than in some other cases but in light of the work of the IRAL Panel, the submissions to its call for evidence, and the engagement with stakeholders carried out by the Ministry of Justice during the consultation, the Lord Chancellor considers that the consultation period was sufficient.
10. The consultation elicited a wealth of helpful responses. Whilst most respondents were broadly opposed to the proposals, many provided argument and information that was invaluable in the process of policy development that followed the end of the consultation.
11. Proposals to legislate for a general framework to clarify the effect of ouster clauses, and to legislate for a broad framework on the principles which lead to a decision being a nullity, will not be progressed. However, proposals on remedies will deal with the potential effects of nullity. The Government will proceed with removing *Cart* Judicial Reviews and with providing additional remedial powers to suspend, remove or limit the retrospective effect of quashing orders, which will be guided by a list of factors and can be made subject to any conditions.



12. The Judicial Review measures in the Judicial Review and Courts Bill are:

- (1) **Removing *Cart* Judicial Reviews**, by which certain decisions of the Upper Tribunal are reviewable by the supervisory courts. The Supreme Court's decision in *Cart*⁶ has given rise to numerous cases challenging Upper Tribunal decisions of which very few are successful, showing that the tribunal system is effective and offers protection consistent with the rule of law. While recognising that access to justice is important, the Government considers this to be disproportionately resource intensive. This legislation excludes the ability to judicially review the decision of the Upper Tribunal to refuse permission to appeal from the First-tier Tribunal, but leaving a residual review jurisdiction for the supervisory courts in certain circumstances, to ensure the structure of the courts system is consistent with the rule of law.
- (2) **Providing for the court to suspend quashing orders as a remedy in Judicial Review cases**. Like overturning *Cart*, this was one of the IRAL Panel's substantive recommendations. This proposal will allow the court to suspend, for a specified time, the effect of an order quashing a decision or action. This gives the public authority time to take action, such as making transitional arrangements, in anticipation of the quashing order coming into effect. This legislation gives a discretion to suspend quashing orders, with this discretion being guided by a non-exhaustive list of factors.
- (3) **Providing for the court to limit the retrospective effect of quashing orders as a remedy in Judicial Review cases** (where a court would make the effect of a quashing order prospective rather than retrospective). The exercise of this power would be guided by a non-exhaustive list of factors. Whilst not recommended by the IRAL Panel, we see merit in giving judges discretionary use of this remedy so that, in certain situations, the adverse effects of retrospective quashing may be avoided.
- (4) **Outline the list of factors that will guide the court's discretion and create a presumption that the court should use the powers outlined above where they would offer adequate redress to the claimant**. Presumptions were not recommended by the IRAL Panel and generally met with scepticism from respondents to the consultation. However, the Government believes that this presumption alongside the factors for the court to consider will guide a quicker development of consistent principles governing the use of these new remedial powers.

6 R (on the application of *Cart*) v The Upper Tribunal [2011] UKSC 28

(5) Making clear on the face of the Bill that the legal concept of nullity does not prevent or fetter the court's remedial discretion. This ensures that the concept of nullity or effects of invalidity could not be used to undermine the courts' discretion to use these remedial powers.

13. The present document summarises the responses to the consultation in so far as they relate to substantive (not procedural) law reform and sets out the measures which the Government is taking forward in the Judicial Review and Courts Bill. The procedural reforms are not a relevant consideration for the Bill as they are a matter for the independent CPRC. Responses to these questions will be considered and responded to at a later date.
14. The consultation document included a high-level assessment of the economic and equality impacts of the policy proposals with a commitment to develop a full Impact Assessment and Equality Statement alongside the consultation response. These are being published at the same time as this response document.

Wider Judicial Review Considerations

15. Section 2 of the consultation document, which set out the Government's thinking as to the real and perceived developments of the law in relation to Judicial Review over recent years, did not contain any proposals for change. For this reason, the present document does not propose any measures in relation to the matters discussed in that Section. However, many respondents had views on its contents and we therefore set out the Government's further reflections here.
16. Respondents argued that, at most, there are a handful of court decisions that were arguably incorrect and that, therefore, there isn't a wider problem to address. This reasoning is predicated on the view that a problem is not a problem unless it happens often. The Government is not persuaded by that argument, since even a single case can have wide ramifications.
17. The purpose of Judicial Review, in statutory contexts, is to ensure that those who Parliament entrusts with public powers do not exceed or misuse those powers. And so the role of the courts in Judicial Review is to be the servant of Parliament. The standard grounds of Judicial Review, which review the exercise of powers granted by Parliament, are best seen as interpretative presumptions. So, when Parliament grants a power it is presumed to intend that the power is to be exercised in good faith, reasonably, for the purposes for which it is granted, taking into account all relevant considerations and ignoring all irrelevant considerations. While these principles and their current application are largely uncontentious, there are emerging grounds of Judicial Review which give some cause for concern. The Government is concerned about the possible direction of travel in three areas, as discussed below.
18. The first is the possibility of the misuse of *Wednesbury*⁷, due to the potential⁸ difficulty in finding an objective way to measure it, and the varying levels of intensity it is said to have. On the latter point Lord Justice Haddon-Cave's recent Gresham lecture is instructive:

"the constant refinement and Enigma variations on *Wednesbury* and the spawning of a myriad of different public law tests in an attempt to achieve 'perfection' in every scenario has led to a great deal of obscurity and entanglement. Bright lines are no bad thing in the good administration of justice and good government. Not everything can be nuanced. In the slightly Alice-in-wonderland world of close or anxious or intense or quite intense scrutiny in public law, you will forgive me for asking: Is today *Wednesbury* or *Thursbury* and *Fribury*?"⁹
19. The theoretical malleability of 'unreasonableness' and its arguable closeness to value judgements means it could be subject to conceptual overreach, or used to provide a basis for other substantive grounds of Judicial Review.
20. Second, and related to that, are the calls for proportionality (i.e. the idea that the court does not just look at whether the decision maker has properly used the powers given to it by

⁷ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223

⁸ See Lord Carnwath's discussion in <https://www.supremecourt.uk/docs/speech-131112-lord-carnwath.pdf> the ALBA Annual Lecture 2013 (supremecourt.uk) page 18. See also <https://ukconstitutionallaw.org/2013/11/20/mark-elliott-where-next-for-the-wednesbury-principle-a-brief-response-to-lord-carnwath/> Mark Elliott: Where next for the *Wednesbury* principle? A brief response to Lord Carnwath – UK Constitutional Law Association (UK Constitutional Law Association Blog <https://ukconstitutionallaw.org/2013/11/20/mark-elliott-where-next-for-the-wednesbury-principle-a-brief-response-to-lord-carnwath/>).

⁹ Complexity and the Law, Gresham Lecture, page 10: <https://www.gresham.ac.uk/lectures-and-events/law-complexity>

Parliament but also whether the decision or action is a proportionate way of achieving a policy aim) to become a general ground of Judicial Review. This would fundamentally change the role of the courts and risk a kind of adjudication which draws the judiciary into political or value-laden questions. The courts have in fact pointed out such dangers themselves. For example, Lord Neuberger in *Keyu v FCO* summed up the risk adroitly:

"The move from rationality to proportionality, as urged by the appellants, would appear to have potentially profound and far-reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each such interest"¹⁰

21. In the absence of explicit Parliamentary authorisation (as was provided in the Human Rights Act) proportionality should not be seen or become a standard ground of review.
22. The third concern is around the principle of legality. The IRAL Report discussed¹¹ one element of this – the lack of certainty about the triggers for the principle of legality. Another element is the concern Professor Varuhas has raised about what he terms the "augmented" and "proactive" variants of this principle which "make significant inroads into executive discretion, and Parliament's capacity to reshape the common law, even where it manifests its intent by clear words."¹²
23. The Government believes none of these three areas are at a stage where legislative intervention is required to maintain the proper balance between the Executive, Parliament, and the Judiciary. The Government agrees with the IRAL Panel that, "solutions to any potential problems of judicial overreach and uncertainty created by the current state of the law on the grounds of Judicial Review must come from the courts, and the courts should be encouraged to do what they can to address these problems."¹³

¹⁰ *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 [133]

¹¹ IRAL at 3.31-34

¹² Varuhas, '*Principle of Legality*', *The Cambridge Law Journal*, (December 2020)

¹³ IRAL at 3.18

Government Response

Overview

24. There were 141 responses to the consultation. A list of respondents is at Annex A.
25. Responses to the consultation are considered by proposal rather than by question, as several questions addressed the same theme and many responses addressed the consultation thematically rather than by question. The proposals are:
- *Cart* Judicial Reviews
 - Ouster Clauses
 - Remedies:
 - Suspended quashing orders
 - Prospective quashing orders
 - Nullity
 - Other Remedies
 - Procedural reforms

Quantitative Breakdown of Responses

Type of Response	Count	% Total
<i>Online Portal</i>	58	41
<i>By Email</i>	83	59
<i>Total</i>	141	100

Fig. 1

Author	Count	% Total
<i>Law Firm (a registered law firm)</i>	21	15
<i>LAWYER (AN INDIVIDUAL LAWYER, RESPONDING IN A PERSONAL CAPACITY)</i>	5	4
<i>PARLIAMENTARIAN (A MEMBER OF EITHER HOUSE OR A PARLIAMENTARY GROUP)</i>	2	1
<i>PRIVATE CITIZEN (AN INDIVIDUAL RESPONDING IN A PERSONAL CAPACITY)</i>	39	28
<i>ACADEMIC (A PERSON OR GROUP OF PERSONS HOLDING ACADEMIC QUALIFICATION(S))</i>	17	12

Author	Count	% Total
OTHER ORGANISATION (ANY ORGANISATION WHICH IS NOT A LAW FIRM, LEGAL ASSOCIATION OR ACADEMIC BODY)	31	22
LEGAL ASSOCIATION (A GROUP, ORGANISATION OR ASSOCIATION MADE UP OF LAWYERS OR LAW FIRMS)	26	18

Fig. 2

THEMES BY RESPONDENT	CART JUDICIAL REVIEW	OUSTER CLAUSES	SUSPENDED QUASHING ORDERS	PROSPECTIVE QUASHING ORDERS	NULLITY	OTHER REMEDIES
LAW FIRM	18	18	20	19	17	8
LAWYER	5	3	4	4	4	0
PARLIAMENTARIAN	2	2	2	2	2	0
PRIVATE CITIZEN	30	30	29	31	32	1
ACADEMIC	11	15	12	13	11	3
OTHER ORGANISATION	19	24	25	26	19	14
LEGAL ASSOCIATION	20	22	22	23	19	8

Fig. 3

Qualitative Breakdown

26. Respondents were generally against removing *Cart* Judicial Reviews, which they saw as a valuable route of challenge, and they felt their argument was strengthened by the IRAL Panel's data in relation to *Cart* Judicial Reviews having been called into question. Respondents were generally in favour of providing the courts with discretion for any of the proposed remedies, and widely against any requirement or presumption being imposed. Respondents voiced concerns relating to suspended and prospective remedies, as well as proposals relating to nullity. Many provided helpful examples or case studies across the span of the Government's proposals.
27. Of the Government's proposals only one, the removal of *Cart* Judicial Reviews, applies to the Devolved Administrations. The Welsh and Scottish Governments did not support this reform and were critical both of the short length of the consultation period and the fact that it ran through their pre-election period. In response, the Government undertook additional engagement with the Welsh and Scottish Governments beyond the consultation period, through a combination of meetings and exchanges of letters.

Cart Judicial Reviews

28. The IRAL Panel recommended that the Government should legislate to reverse the effect of the Supreme Court decision in *Cart*, thereby re-affirming that decisions of the Upper Tribunal to refuse permission to appeal are not subject to the supervisory jurisdiction of the High Court.
29. The Government agreed with the Panel and in Question 2 of the consultation document sought views on this reform and how best to implement it. Of the 105 respondents who answered this question, most were against overturning the *Cart* judgment.
30. The majority of respondents felt the IRAL Panel had reached an erroneous conclusion on *Cart* because (they argued) the Panel had used inaccurate data as to the proportion of *Cart* cases that are successful. Respondents cited a variety of reasons as to why the methodology used by the Panel to analyse success rate was flawed. For example, it took no account of the presumption in CPR 54.7A(9)(b) that cases in which permission is granted are quashed. Many considered that the injustice that *Cart* Judicial Reviews prevent, in ensuring that errors can be corrected, is more important than any concerns about resource, particularly as any cases that succeed involve important points of law. In any case, they said, there is no evidence that *Cart* Judicial Reviews are a "significant cost", indeed the streamlined procedure set out at CPR 54.7A is designed to reduce the judicial resources required to deal with *Cart* Judicial Reviews compared to other non-*Cart* applications; the two cannot be compared like-for-like.
31. Other responses, particularly from claimant groups and non-government organisations, argued that *Cart* Judicial Reviews should not be removed in any circumstances as they are needed in order to maximise protection of individual rights. Respondents pointed out that overturning *Cart* would primarily affect immigration and asylum cases and argued that the potential human rights consequences might be severe under the European Convention on Human Rights (ECHR) and the Refugee Convention. These respondents felt that if *Cart* were reversed another 'safety valve' should be provided, such as a statutory right of appeal to the Court of Appeal, to ensure that errors can be corrected.
32. Alternative mechanisms suggested by respondents included the Upper Tribunal reviewing its own refusal to grant permission to appeal from the First-tier Tribunal¹⁴, and amendments to procedures to make *Cart* Judicial Review more efficient and effective.
33. By contrast, some submissions – mostly from academics – favoured reform, as they argued that regardless of the evidence base, the Upper Tribunal affords sufficient oversight as an independent body with specialist expertise and equivalent status to the High Court. Other respondents argued that justice does not require endless opportunities for judicial consideration of a claimant's case.
34. Some respondents highlighted that the proposal would have implications for the devolved nations and raised issues of bifurcation of the Judicial Review jurisdictions in the United Kingdom (UK). For this reason, it was felt that the proposal should be limited to England and Wales due to differences between the Judicial Review process in England and Wales and the process in Scotland (which has additional safeguards), and because there is no evidence of a high volume of applications and low proportion of successful outcomes in Scotland.

¹⁴ There is presently such a power in section 10 of the Tribunals, Courts and Enforcement Act 2007.

Government Response

35. In light of criticism of the IRAL Report's finding that only 0.22% of *Cart* Judicial Reviews are successful, the Ministry of Justice undertook a fresh analysis of the data. This work is set out in full in the Impact Assessment which is available online (but is also set out in Annex E of this document) and concludes that the success rate is around 3%. The IRAL Panel were therefore right to conclude that the success rate in *Cart* cases is substantially lower than the success rate¹⁵ in other types of Judicial Review, where the data indicate a range of 40% to 50%¹⁶.
36. Given the high number of *Cart* Judicial Review claims (around 750 a year from 2016-2019), the very low success rate, and that the Upper Tribunal is a Superior Court of Record (which means it can set precedents and enforce its decisions) presided over by senior judges, which sits as the apex of a wider system of checks and balances for certain administrative decisions, the Government's conclusion is that *Cart* Judicial Reviews are a disproportionate use of valuable judicial resource.
37. To improve the efficiency of the courts and reaffirm the position of the Upper Tribunal, the Government has decided to legislate to overturn the *Cart* judgment. Given that the objective of the change is to remove the disproportionate and unjustified burden from the system, the Government does not intend to create an alternative route of challenge as this could simply shift the impact on resources to another part of the justice system.
38. A full devolution analysis has been conducted to understand the impact of this proposal in the devolved nations. In light of the available evidence base, this measure will apply UK-wide, *insofar* as they relate to reserved matters.
39. The Government conducted a Public Sector Equality Duty (PSED) analysis to understand the discriminatory impact this proposal would have in relation to protected characteristics under the Equality Act 2010, taking into account the consultation responses. While the assessment acknowledges the risk of indirect discrimination arising from removing the *Cart* Judicial Review route – because of the high proportion of cases in the Immigration and Asylum Chamber that will be affected by the reform and the race, religion or belief of the claimants in such cases – it concludes that the policy is proportionate because of the resource implications associated with administering such cases and the very low success rate in comparison to other types of Judicial Review. The full assessment is available online.
40. The means by which this measure will be implemented will be covered in the Ouster Clauses section that follows.

¹⁵ Here, we define a "successful" case as one where an application for a *Cart* Judicial Reviews has resulted in the original permission to appeal refusal being quashed (either because permission to appeal has been granted and the decision automatically quashed under CPR 54.7A(9)(b) or because the claimant is successful at full hearing) and the Upper Tribunal finding in favour of the claimant (which usually results in a decision of the First-tier tribunal being quashed). We recognise there is no like-for-like comparison possible with other kinds of Judicial Review, but the academic consensus supports the approach of comparing a reasonable metric of 'success in a *Cart* Judicial Reviews' with a reasonable metric of 'success in a Judicial Reviews generally'.

¹⁶ The IRAL report considered various sources on the subject, and the broad consensus appears to be around this figure – IRAL Report (CP407), 177

Ouster Clauses

41. In their report, the IRAL Panel made no specific recommendations in relation to ouster clauses but maintained that Parliament could limit or exclude Judicial Review in particular circumstances if there are 'highly cogent reasons' for taking this course¹⁷. The Panel also regarded Parliament legislating to overturn certain cases, thus rendering specific ouster clauses effective, as a legitimate approach. In addition, the Panel's recommendation to overturn *Cart* is, in the Government's view, best achieved by an ouster clause, which led to our considering how ouster clauses could be made effective.
42. The Government agreed that ouster clauses should be effective where there is sufficient justification and felt there might be merit in clarifying the principles of interpretation which the courts would have to apply when interpreting an ouster clause. Accordingly, Question 8 of the consultation document asked respondents whether the proposed methods (a framework), or alternatives, would achieve the aim of giving effect to ouster clauses.
43. A significant majority of respondents were critical of a framework approach to ouster clauses, which they considered unjustified and insufficient to provide adequate protections for ousted decisions. This is due, in part, to the fact that interpretation is largely dictated by the specific circumstances before the court and the particular drafting of the clause, meaning that a one size fits all framework would not lessen confusion, but potentially add to it.
44. Non-government organisations tended to be against the idea of ouster clauses more generally due to concerns about the implications of such clauses when considered against the rule of law. Some respondents also expressed the view that the case for such a framework approach was not made by the analysis in the IRAL report and therefore the Government was not justified in pursuing it.
45. A majority view held that, instead of creating a potentially faulty framework, the Government should divert its efforts to drafting more specific and tailored ouster clauses that are appropriate to the specific legislation at hand, which would be more likely to be welcomed by the courts and Parliament. It was considered that such efforts would be more likely to be successful, as judicial criticism is often centred on the appropriateness of ouster clauses to the particular legislation under consideration by the court.

Government response

46. The Government is persuaded by the majority view of respondents that a framework is too complicated and risks reducing rather than enhancing clarity and certainty around the law. On this basis it will not take this proposal forward.
47. However, to ensure that the courts no longer render ouster clauses of no (or very limited) effect, where there is sufficient justification, the Government believes that an appropriate way to accomplish the objectives of (i) removing *Cart* Judicial Reviews and (ii) ensuring the courts give more effect to ouster clauses in the longer term where there is sufficient justification, is to propose a narrow ouster clause which focuses on removing the route of *Cart* Judicial Review.

¹⁷ IRAL Report 2.89

48. Prior to the *Anisminic* judgment¹⁸, it was well established that ouster clauses would not be interpreted as removing the potential for challenge by Judicial Review if the body acted in excess of its jurisdiction (i.e. beyond the scope of its powers)¹⁹, or, in cases of tribunals, acted in a fundamental breach of natural fairness²⁰. However, if the body made an error within its competence then the courts gave effect to the ouster which removed from the decision the Judicial Review route of challenge.
49. If the decision was made in excess of jurisdiction then the ouster would not remove Judicial Review; conversely if the decision was within jurisdiction then the ouster clause would remove Judicial Review. *Anisminic* did not reject the relevance of this distinction – which was reaffirmed in subsequent case-law²¹ – but the court *did* interpret the particular error of law as actually going to jurisdiction, leading to the decision being a nullity so that it was not protected by the ouster clause.
50. It is, in the Government's view, highly unusual for Parliament to want to oust Judicial Review for truly jurisdictional errors, or for fundamental breaches of natural fairness.²² However, the judgment in *Anisminic* has widened the circumstances in which an error would be considered jurisdictional by the courts.
51. In response, Parliament passed wider ouster clauses which appeared to oust Judicial Review even for jurisdictional errors. This is what Parliament did in the provision at issue in *Privacy International v Investigatory Powers Tribunal* [2019] UKSC 22. However, this still led to interpretative difficulties.
52. The Government considers the issue is that to legislate is to communicate, and communication requires a common and stable language²³. If there are no fixed and stable categories of jurisdictional and non-jurisdictional matters, this makes communication difficult.
53. The Government believes there is a distinction between (1) excess of jurisdiction (the body didn't have power to do what it did), (2) abuse of jurisdiction (the body breached principles of natural justice) and (3) all other errors, including errors of law. The Government also believes that, at least for quasi-judicial bodies, there is no rule of law issue with removing Judicial Review for (3)²⁴. The Government thinks it would be unusual for Parliament to do so for (1) and (2). Following *Privacy International*, which involved discussion of such distinctions, the Government is confident the courts will accept the distinction between (1), (2) and (3), despite the possible existence of borderline cases.
54. To ensure proportionality and to not exclude Judicial Review to any greater extent than is necessary, we have decided that the *Cart* ouster clause should not exclude Judicial Review for (1) and (2).
55. The explicit *Cart* ouster clause, designed to meet the common law requirements for effectiveness, will be used as an example to guide the development of effective legislation in

18 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

19 For example, *Ex p Bradlaugh* (1878) 3 QBD 509, 513 (Cockburn CJ)

20 For example, *R v Cheltenham Comrs* (1841) 1 QB 467, 113 ER 1211

21 *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363

22 That is not to say however, that in different contexts a different standard or type of ouster clause would be appropriate – for example in relation to re-affirming or restoring the non-justiciability of certain powers.

23 R. Ekins, *The Nature of Legislative Intent*, (OUP, 2012), p.126

24 On this point we agree with Professor Endicott that “the general rule of review for error of law is not justified by constitutional principle” (*Administrative Law*, 4th Ed, p. 330).

the future. Furthermore, after legislating to implement an effective ouster in relation to *Cart* Judicial Review, the Government intends to carry out an internal follow-up exercise to identify and review (with a view to potentially updating where necessary) the other ouster clauses currently on the statute book, including the ouster clause in *Privacy International*.

Remedies

56. The IRAL Panel recommended providing the courts with additional remedial flexibility by giving them the power to grant a quashing order which will automatically take effect after a certain period of time if certain specified conditions are not met. The IRAL Panel did not, however, make any recommendation in relation to any power to remove or limit the retrospective effect of quashing orders. However, the idea of prospective-only quashing orders was raised in some of the submissions to the IRAL call for evidence and there is arguably a useful precedent contained within section 102 of the Scotland Act 1998, which allows a court or tribunal to make an order that removes or limits the retrospective effect of a decision in certain situations when a public body has acted beyond its competence. We considered this example relevant due to the wording of the legislative provisions giving powers to the courts to alter the effects of relief, and the inclusion of a factor to consider, rather than the circumstances in which such a power could be used. After careful consideration the Government decided there was merit in exploring this measure through consultation.
57. In their arguments concerning the suspending of quashing orders, the IRAL Panel discussed the limitations of the common law doctrine of nullity. This doctrine, as discussed in *Ahmed (No.2)*²⁵, could undermine the effectiveness of quashing orders. The Government is further concerned with the application of nullity relating to issues of legal certainty and remedial discretion. The Government was interested in clarifying the principles which determine how the courts declare nullity by operation of law. The consultation proposed possible principles.
58. The IRAL Panel did not make recommendations regarding the implementation of any proposal to suspend quashing orders beyond suggesting some wording for amendment to the Senior Courts Act 1981. The Government was interested in examining factors which the courts might consider when deciding whether to suspend a quashing order or make it prospective-only, with a view to providing greater certainty for both parties. The consultation proposed possible factors in providing guidance to the courts.
59. The IRAL Panel gave a name to such orders, calling them 'Suspended Quashing Orders', which the Government duly used in its consultation alongside 'Prospective-only Remedies'. However, importantly, these are not entirely new remedies, rather the ability to suspend a quashing order is a modification of the effect of a quashing order. As such, in this consultation response, to avoid confusion as to whether any new remedies are being introduced as opposed to new methods of modifying existing remedies, terms such as 'Suspended Quashing Order' will not be used, with terms akin to 'a power to suspend the effects of a quashing order' being preferred for their accuracy.

25 HM Treasury v Ahmed [2010] UKSC 5

Suspending the effects of quashing orders

60. Together with overturning *Cart*, 'creating a suspended quashing order' was one of the IRAL Panel's two substantive recommendations. The Panel recommended the introduction of a wide discretion to suspend the effects of quashing orders to increase flexibility in allowing the court to tailor its remedies better to the facts of the case, giving a more just outcome to both parties.
61. The Government agreed with the Panel. By giving the decision-maker the opportunity to make good any errors, instead of immediately quashing the decision, the measure maintains the effectiveness of remedies for citizens, while ensuring that those remedies do not impede effective government. Accordingly, the Government was interested in examining ways this provision could be implemented through the consultation.
62. There were 110 responses to Questions 1 and 6, which asked respondents if they considered it appropriate to use precedent from section 102 of the Scotland Act²⁶ 1998 (i.e. to have a discretion guided by a list of factors), or the suggestion from the IRAL Panel of an unguided discretion to suspend the effects of a quashing order. Furthermore, respondents were asked whether there is merit in creating a presumption that quashing orders be suspended, or a requirement for them to be.
63. Most responses were in favour of introducing a wide discretion to be afforded to judges, in preference to any approach that included factors²⁷, presumptions or requirements. A significant proportion refused to consider the remedy being implemented in any way other than as a discretion. Almost all respondents were opposed to mandating the suspension of quashing orders, citing myriad examples of where suspension would be inappropriate or unfair to impose.
64. However, respondents raised concerns about a discretion to suspend quashing orders guided by factors. For example, some felt that an increased availability of remedies and factors would give rise to satellite litigation, which in turn would increase the length and cost of Judicial Reviews.

Government response

65. Following the definition provided by the IRAL Panel, in the Government's consultation document a Suspended Quashing Order was defined as a quashing order given by the courts, the effect of which was delayed to give the defendant time to comply with conditions set by the court. If the conditions were met, the quashing order would not take effect at the end of the period of suspension. Respondents helpfully pointed out that this definition conflated two separate remedial discretions:

- A suspension of the effects of a quashing order: A quashing order modified to be suspended for a limited period of time, giving a party time to make transitional arrangements to deal with the effects of the impending quashing. No conditions

26 Section 102 of the Scotland Act gives the court discretionary powers to suspend the effect of Scottish primary or secondary legislation, or a decision by a member of the Scottish Government, and requires the courts to have regard to a sole factor, being any adverse interests of third parties.

27 Respondents gave feedback on some proposed factors including (a) whether the procedural defect can be remedied (b) whether remedial action to comply with a suspended order would be particularly onerous/complex/costly and (c) whether the cost of compensation for remedying quashed provisions would be excessive

are attached to this order, and the order simply allows for transitional arrangements to be made.

- A conditionally withheld quashing order: a granting of a quashing order that is withheld for a period of time with conditions attached, to allow a party to take steps for the defect to be corrected by satisfying those conditions. If the conditions are fulfilled, then the quashing order will not come into effect. This potentially allows the public body to obviate the quashing order coming into effect if the conditions set by the court are satisfied.

66. To this end, the consultation exercise helped to define these two elements of the IRAL suggestion as separate ideas. Notably, the two variants are useful in different instances: suspending the effect of quashing orders can be used where defects are large, giving the defendant time in the intervening period to remake its decision in a lawful manner, enact any transitional arrangements, or even seek to legislate (potentially retrospectively) to preserve the state of the law as it was before the quashing order was made. None of these actions (apart from primary legislation to give the Government power which it previously lacked with retrospective effect) may lead to the validation of the quashed decision, reversal of the quashing order or removal or further limitation to the effect of that quashing order. This is the order as envisaged in *HM Treasury v Ahmed* (no. 2) [2010] UKSC 2, with the quashing order being final, but with a period of time to prepare for it coming into force.
67. A quashing order that is conditionally withheld would be appropriate in a situation where the defect is minor. For example, the courts could use such an order to require the defendant to publish previously unpublished data or policies where this was required. This modified order could save the defendant time in remaking entire decisions where there was only a flaw in a distinct part of the decision-making process.
68. That being said, the Government has decided not to pursue the introduction of a specific power to conditionally withhold quashing orders. In undertaking analysis on this measure, the Government considered that there are significant issues. Firstly, in determining whether a condition has been complied with in deciding whether this led to a decision being quashed, a second hearing may often be required. This would increase the length of Judicial Review proceedings and create practical difficulties in relation to costs and appeals. Secondly, and in light of this, the Government considers that the extremely limited circumstances in which this particular type of remedy would be suitable do not justify the potential uncertainty and practical difficulties created by this power. In any case, the Government considers that the current array of remedies, coupled with the suspended and retrospectively limited quashing orders being introduced by the Judicial Review and Courts Bill, will be sufficient to give the courts remedial flexibility – and can, used in combination, allow a defendant to remake or modify a decision without prejudicing past use of that decision. Moreover, not proceeding with a specific power to conditionally withhold quashing orders does not affect the current common law powers of the court, or their ability to use their remedial powers to similar effect.²⁸
69. Respondents were concerned about the increased likelihood of satellite litigation which could increase the length of litigation. The Government considers, however, that this is a potential risk with any change in the law, and that it does not undermine the effectiveness

²⁸ For example, in *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214 demonstrated a creative approach taken by the Court of Appeal to granting remedies. On appeal the Supreme Court held that there had not been anything unlawful and so they did not consider the remedial question ([2020] UKSC 52 at [167]).

of introducing an ability to suspend quashing orders (as well as an ability to limit the retrospective effect of quashing orders, as discussed below).

70. Respondents further argued that the proposed measures could lead to poor administration. On the contrary, the Government considers that suspending a quashing order would considerably improve administration, by limiting the need for large regulatory regimes to be hastily re-created in light of a quashing order, as the defendant is given time to remake the original decision. Finally, many respondents considered that *Ahmed (No.2)* did not preclude suspending quashing orders. But the point at stake in *Ahmed (No.2)* was not about that kind of suspension. The court in that case saw the invalidity of the decision being performative, and affecting its legal status rather than the quashing order making it so. Therefore, the court found that a quashing order that was suspended would be pointless, as it would not affect the underlying invalidity. However, the Government wishes for any ambiguity as to the effectiveness of these remedies to be resolved and therefore is making explicit provision that the use of the new remedial powers has the effect of deeming the impugned decision as valid for all intents and purposes, as if that validity had not been impaired by the defect, for whatever time-period the court specifies. The Government also wishes for this remedial modification to be more regularly considered and used; the Government does not consider the suspension of a quashing order as only being appropriate in the most exceptional circumstances, rather it should be used more commonly.
71. The Government is content that this measure, which includes the court turning its attention to certain factors, will develop a helpful body of jurisprudence. The cases highlighted by respondents in relation s.102 of the Scotland Act (albeit in a different context) indicate that there is considerable scope for development here, and that jurisprudence will help guide the consistency with which these factors are used.
72. An ability to suspend a quashing order will allow the courts to improve administration by ensuring the defendant has time to thoroughly consider any replacement decision or regulation, which would not be the case with an immediate quashing.
73. In light of the arguments raised in the responses to the consultation, the Government will legislate for a general discretion with a non-exhaustive list of factors for the courts to consider when deciding whether this remedy is suitable. The list of factors will respect the discretion of the court and will therefore focus on general principles, rather than imposing prescriptive conditions. This should aid consistency as the courts consider when and how to grant the new modified order. Factors will include whether immediate quashing would prejudice the interests or expectations of third parties and will be phrased neutrally in the statute.

Limiting the retrospective effect of quashing orders

74. In their report, the IRAL Panel made no recommendations in relation to removing or limiting the retrospective effect of quashing to make them prospective-only. However, as with suspending the effects of quashing orders, there is precedent for such a measure, albeit in a slightly different context, in section 102 of the Scotland Act. The Government was interested in exploring, through consultation, the introduction of prospective-only remedies, to be used at the discretion of the court, in accordance with certain principles. The intention of this measure

is to provide the courts with an option to apply a remedy in the future only, rather than retrospectively, and increasing certainty in relation to administrative action.

75. There were 110 responses to questions 4 and 5 which asked respondents whether a discretionary power for prospective-only remedies should be introduced, and if so, whether a presumptive or mandatory approach be taken.
76. There was disagreement between respondents. While some agreed with introducing an ability to limit the retrospective effect of quashing orders, others raised principled and practical concerns and there was significant resistance to a presumption or requirement due to concern that it would lead to injustice. These arguments, broadly following those set out in *Re Spectrum Plus Ltd* [2005] UKHL 41, suggest that granting prospective-only quashing orders places the courts in a quasi-legislative position (making law, rather than declaring what it is and always has been), and discriminate between the claimant and those potential future claimants with similar claims.
77. It was often highlighted by respondents that quashing orders with a limited retrospective effect could leave the claimant without a remedy, and this could deter claimants from bringing a claim. It was also noted that quashing orders with limited retrospective effect would uphold unlawful action and enable the defendant to leave maladministration unrectified.
78. It was also argued that the use of prospective-only remedies would place a significant emphasis on the speed of the litigation process itself. Claimants might well seek expedition, and shorter time scales, in order to expand the class of those potentially able to benefit from a successful judgment. It was suggested that this would place increased pressure on both defendants and the courts to deal with litigation in a shorter timescale.
79. Other respondents saw merit in the proposals. Some noted that there is nothing radical about consequences being prospective-only and that judgments of this nature have been made in the Court of Justice of the European Union. Other respondents highlighted that the ability to make quashing orders prospective-only emphasises the remedial flexibility of the courts and stops the doctrine of nullity (as explored below) from undermining judicial discretion. Finally, it was noted that prospective-only quashing orders do exist, as highlighted by *Re Spectrum Plus Ltd* [2005] UKHL 41, but that they are limited to exceptional circumstances.
80. Respondents suggested that any use of factors to guide the court's discretion would lead to satellite litigation.
81. Once again, a presumption and a requirement were generally not favoured. Respondents raised instances where a retrospectively modified quashing order would not be appropriate, and one highlighted a period of six years in which only seven statutory instruments had been retrospectively quashed. Respondents noted that the courts may struggle to get around a presumption, leading to the fossilisation effect as described above.

Government response

82. It is the Government's view that the argument for increased remedial flexibility extends to providing the courts with a power to make quashing orders prospective-only in effect. Giving judges the discretion to provide a prospective-only remedy will mean that, in certain

situations, the adverse effects of retrospective quashing may be avoided – such as severe administrative or economic consequences. The Government’s intention is that the court’s discretion to grant this type of remedy will be guided by a non-exhaustive list of factors.

83. The Government notes the points expressed by respondents, but it considers that the concerns raised do not substantially undermine the rationale for having a discretionary power for these remedial modifications. The Government does not consider that limiting the retrospective effect of quashing orders prevents good administration, rather it enhances it. Legal certainty is retained, as third parties can rely on a regulatory regime being upheld in the past, and then corrected in the future (once a defendant has passed remedial legislation). Public resources are therefore spent making a regulatory regime work, as opposed to being focussed on resolving retrospective reliance.
84. Furthermore, the Government considers that by providing such powers as a discretion for judges to use, issues of claimants being deprived of a remedy, discrimination between claimants, listing issues, and deterring claimants can all be avoided. The Government considers that this provides a safeguard, as it has done in the Court of Justice of the European Union, for instance, from which lessons can be learned as to how this remedy can be applied.
85. The use of the power to give prospective relief operates in the same way as suspending relief, in terms of the deemed validity of the impugned act.

Factors to guide the court’s discretion

86. The Government proposed that any discretionary power of the courts should be guided by certain factors set out in legislation that are to be considered by the court. The Government considered that such factors would be helpful in providing consistency and expanding the jurisprudence as to how these remedial modifications are used. This should provide greater certainty for both parties, so the Government consulted on which factors would be appropriate in providing guidance to the courts.
87. Question 4, which asked respondents which factors they consider relevant in determinations for prospective-only remedies, elicited 119 responses.
88. Most respondents considered that the current system is robust enough and that prescribing factors would risk limiting judicial discretion to determine what should be taken into account in deciding whether the remedy is appropriate in individual cases. However, some suggested potential factors that could be used if the Government wished to include a non-exhaustive list of factors to guide the court’s discretion.
89. The consultation document set out several examples of factors the courts might use. Respondents had mixed views about their efficacy, but 40 factors were suggested by respondents themselves. Some said that any legislation would need sufficient flexibility to allow for principles to be developed through case law, so it was important that any list of factors was non-exhaustive.

Government response

90. The Government is of the view that there is merit in having factors for the courts to consider, rather than the courts having complete discretion. The Government has concluded that, in deciding whether to prospectively quash a power or suspend the quashing the following factors should be taken into account by the courts:
- (1) the nature and circumstances of the relevant defect;
 - (2) any detriment to good administration that would result from exercising or failing to exercise the power;
 - (3) the interests or expectations of persons who would benefit from the quashing of the impugned act;
 - (4) the interests or expectations of persons who have relied on the impugned act;
 - (5) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;
 - (6) any other matter that appears to the court to be relevant.
91. This is a non-exhaustive list and it is not framed to justify any particular remedy, but rather to ensure a well-reasoned conclusion for any remedy that is granted.
92. Respondents were opposed to using 'economic impacts' as a factor, as it would draw the judges into the policy space. The Government agrees and is not pursuing this as part of any factor. Other factors²⁹ were not adopted on the basis that they were too complex, used novel terminology, or required the court and parties to consider questions that were not relevant.

Presumptions

93. The Government proposed that a presumption might be used to guide the courts' discretion in the use of any or all the new remedial powers. In some cases, this would be on a specific basis, as discussed above in relation to statutory instruments. In others it would be a more general presumption to use one or all the new remedial powers by default.
94. A large majority of respondents argued against the use of presumptions in any circumstances, generally citing concerns over fettering judicial discretion or potential injustice to claimants if it was less likely they would receive equitable relief due to a presumption against it. Respondents raised examples where such a presumption would cause injustice.
95. Some respondents saw advantages in terms of legal certainty, and thought that a presumption balanced that need with the requirements of justice better than a requirement, but nevertheless would tip the balance too far. However, others noted that a presumption may attract satellite litigation to test its bounds, and the operation of the presumption might not be clarified for some time.

²⁹ Other considerations that Government suggested included: a) whether the procedural defect can be remedied, b) whether remedial action to comply with a suspended order would be particularly onerous/complex/costly, c) whether the cost of compensation for remedying quashed provisions would be excessive (Government Response paragraph 56).

Government Response

96. The Government is not persuaded that no form of presumption could ever be appropriate. A presumption does not necessarily seek to constrain or limit the courts' discretion, so long as it is rebuttable by wide enough principles to allow the courts to give relief in a form they consider just. What a presumption can do, is direct and guide the court's reasoning to certain outcomes in certain circumstances.
97. The Government believes that the new remedial powers offer adequate redress to claimants in the right circumstances. The list of factors set out above give some idea of the kind of situations in which different forms of relief could be appropriate. The remedial powers also provide an opportunity for more practical remedies, tailored to the circumstances of the case. The advantages of defendants being able to prepare for the effects of a quashing order are significant in terms of saving time, ensuring that decisions are made in the right way or providing for alternative arrangements to be brought in - including remaking or amending decisions. Similarly, there may be significant advantages to third parties being able to rely on past actions taken pursuant to an impugned decision.
98. Therefore, in the right circumstances, where they can provide adequate redress, the Government thinks the courts should consider using the new remedial powers. The further factor included in the presumption – for the court to consider anything that may be done further to any conditions that the court may set – also emphasises the practical aspects of remedial discretion and encourages defendants to think of any undertakings they might give.
99. In this way the Government hopes to encourage the use of the new remedial powers, and development of practical, clear and consistent principles for their use, for which the list of factors provides a basis.

Nullity

100. In their report the IRAL Panel discussed the limitations of the common law doctrine of nullity. The application of the principle of nullity is of concern to the Government as it has two chief disadvantages. Firstly, its use undermines legal certainty, especially (as noted by the Panel) as it is used inconsistently. Secondly, it removes the court's remedial discretion (as it arguably undermines the effect of a quashing order). The Government was interested in clarifying the principles which determine how the courts declare nullity. In the consultation document, the Government proposed several principles which lead to a decision being a nullity by operation of law.
101. Question 7, which asked respondents whether they agreed that legislating for the Government's proposals would provide clarity, elicited 107 responses. Most respondents were wary of making changes to address what is primarily an academic/theoretical concern, rather than a practical one. Many respondents noted that changes could have significant and undesired consequences including increased uncertainty in the law, leading to satellite litigation over the effect of any additional or redrafted provision of nullity in the law. It was also noted that nullity operates distinctly in other areas of law, so changing nullity in the public law context was highly likely to cause unintended consequences. Additional arguments against reform affirmed the importance of the courts' discretion as to what (if any) remedy to grant. Ultimately, respondents considered that reform of nullity was not needed to make

the proposed new remedial powers effective, and that simply expressing the availability of suspended and prospective quashing orders would be sufficient to encourage judges to use them.

Government response

102. The Government (alongside many respondents) is concerned about the effect of nullity on the operation of the proposed remedial modifications. However, in light of the comments from respondents, the Government agrees that the proposed reforms are unnecessary so long as the relevant provisions are drafted to ensure that the legal concept of nullity does not undermine the new remedial powers, and that courts have discretion over which remedies they apply.
103. The IRAL panel, academics and the courts themselves³⁰ have recognised the complexities of the theory around nullity and the ambiguities it can create. Our reforms seek to emphasise the practical nature of Judicial Review and such practical benefit should not become tangled in complex conceptual conundrums. We hope that the courts will use the new powers available to them, and in so doing develop the common law away from the strict principles and requirements of automatic nullity, and towards more pragmatic adjudication. In the final analysis, Judicial Review should support and promote good administration, a position not amenable to inflexible concepts which can have drastic real-world implications.

Procedural reforms

104. Questions 9 to 16 in the consultation document considered procedural reforms. As these reforms would not require primary legislation, but rather would be matters for the CPRC, they are not a relevant consideration for the Judicial Review and Courts Bill. Responses to these questions will be analysed and responded to at a later date.

Other

105. Question 3 asked whether the Government's proposals, where they potentially impact the devolved nations, should be limited to England and Wales. Respondents highlighted the tension between respecting the autonomy of the Devolved Administrations by limiting measures to the jurisdiction of England and Wales and creating a two-tier Judicial Review system in the UK. For proposals relating to the overturning of *Cart*, a full devolution analysis was conducted to inform the position that measures will apply to matters of reserved policy only.
106. Question 17 asked respondents to share information relevant to the Government's impact assessment, while question 18 asked for information relevant to the Government's assessment of equalities impacts. Responses to both questions were considered and have informed the full Impact Assessment (which is available online) and the Public Sector Equality Duty (PSED) analysis (which is also available online). Question 19 asked respondents to highlight mitigations the Government should consider in further developing the proposals in the consultation. Responses to this question have been covered throughout the present document within individual themes.

30 IRAL Report 3.60-3.64

Conclusion

107. The Government is very grateful for the many responses to the consultation, the quality of which was generally high. Judicial Review is an important subject and the responses did justice to this.
108. As the present document sets out, the consultation has allowed the Government to review and revise its original proposals.
109. The measures to be taken forward are contained in the Judicial Review and Courts Bill which is published alongside this consultation response.

Contact details

This document is the Government response to the consultation document: Judicial Review Reform - The Government Response to the Independent Review of Administrative Law.

A Welsh language translation of this consultation response will be available at <https://www.gov.uk/government/consultations/judicial-review-reform>.

Further copies of this Government response to the consultation can be obtained by contacting **Judicial Review Reform team** at the address below and it is also available on-line at <https://consult.justice.gov.uk/>.

By mail to:

Judicial Review Reform
Ministry of Justice
102 Petty France
London SW1H 9AJ

Or by email to

judicialreview@justice.gov.uk

The consultation document is also available at <https://consult.justice.gov.uk/>

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Consultation principles

The principles that government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<https://www.gov.uk/government/publications/consultation-principles-guidance>

Annex A – List of respondents

List of respondents		
36 Immigration	Garden Court Chambers (Public Law team)	One Pump Court Chambers
Access Social Care (ASC)	GC100	Emma Overton
Adferiad Recovery	Robert Goldspink	Oxford University public lawyers
Advocates for Animals	Governance and Human Rights Group, Hillary Rodham Clinton School of Law, Swansea University	Chris Parry
Robert Aitken	Harrison Grant	Dr Augur Pearce
Richard Allen	Herbert Smith Freehills LLP	Graham Phillips
All-Party Parliamentary Group (APPG) on Legal and Constitutional Affairs	Simon Hills	The Planning & Environment Bar Association (PEBA)
Amnesty International UK	Hodge Jones & Allen Solicitors	Policy Exchange's Judicial Power Project
Professor T T Arvind and Professor Lindsay Stirton	Jack Hodgson	David Pollock
Asylum Support Appeals Project (ASAP)	Hogan Lovells International LLP	Graeme Poole
Elizabeth Baigent	Louise Holden	Project 17
Bail for Immigration Detainees (BID)	Keith Hollis	Public Law Project (PLP)
The Bar Council	John Hounslow	Public Law Wales
Dr Mikolaj Barczentewicz	Howard League for Penal Reform	Professor Colin T Reid
BDB Pitmans LLP	Nigel Howells	Ursula Riniker
Samuel Beswick	Bridget Huggett	Royal Society for the Protection of Birds (RSPB)
Bindmans LLP	Humanists UK	Dr Mark Ryan
Peter Binnersley	Immigration Law Practitioners' Association	The Rt Hon Sir Stephen Sedley
Birmingham Law Society	Independent Provider of Special Educational Advice (IPSEA)	Chandra Sekar

List of respondents		
Blair Sessions	International Regulatory Strategy Group (IRSG)	Senators of the College of Justice
David Brock	Irwin Mitchell LLP	Shelter
Bryan (no surname provided)	Richard Jackson	Laura Shepherd
Lord Carnwath	Just for Kids Law (supported by Article 39, Children England, Children in Wales and The Children's Society)	Harold Shupak
Central England Law Centre	JUSTICE	Society of Labour Lawyers
Centre for Women's Justice (CWJ)	Lawd Justice	The Society of Legal Scholars (SLS)
Child Poverty Action Group	JustRight Scotland	Solicitors Sole Practitioners Group
Civil Justice Council	Kingsley Napley LLP	South West Administrative Lawyers Association (SWALA)
ClientEarth	Deborah Kol	James Spencer
Constitutional and Administrative Law Bar Association (ALBA)	Law Centres Network	St John's Chambers
The Consultation Institute	The Law Society	Debra Stanislawski
Coram Children's Legal Centre	The Law Society of Scotland	Sam Stein Q.C.; James Nieto, Nexus Chambers
Robert Craig	Lawyers in Local Government	Mark Straw
Authors of DE SMITH'S JUDICIAL REVIEW	Leigh Day	Judith Sullivan
Deighton Pierce Glynn	Liberty	TheCityUK
DLA Piper UK LLP	Linklaters LLP	Trade Union Congress (TUC)
Maurits Dolmans	Mike Lynch	Alison Turnbull
Doughty Street Chambers	Laurie Marks	Brian Turner
Emma (no surname provided)	Medical Defence Union (MDU)	UK Administrative Justice Institute (UKAJI)
Employment Lawyers Association (ELA)	MIND	UK Environmental Law Association (UKELA)
Equality and Human Rights Commission	Mishcon de Reya LLP	UNISON
Equally Ours	Anne Morgan	Professor Jason Varuhas
Terence Ewing	Dr Jonathan Morgan	Martin Viohl

List of respondents		
Faculty of Advocates (consultation hub submission)	Tony Moss	David Walker
Faculty of Advocates (email submission)	Anthonia Murillo	The Western Circuit
Professor David Feldman	National AIDS Trust	Wildlife and Countryside Link
Ffyon	National Farmers' Union (NFU)	Simon Winter
Freshfields Bruckhaus Deringer LLP	The NIA Project	Alison L Young

Annex B – Glossary

Administrative Court: The Administrative Court is part of the Queen’s Bench Division of the High Court (one of the three divisions of the High Court, together with the Chancery Division and Family Division). It hears most kinds of applications for Judicial Review and some statutory appeals and applications which fall outside the remit of this Glossary.³¹

Anisminic: *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 is a constitutional law case that established the “collateral fact doctrine”, which holds that any error of law made by a public body will make its decision a nullity and that an ouster clause does not deprive the courts from their jurisdiction in Judicial Review unless this is expressly stated.

Claimant(s): The claimant is the person affected by a decision of a public body who wishes to challenge that decision in the Administrative Court. The claimant Judicial Review proceedings can be any individual or incorporated company (also known as a corporation). Partnerships are able to bring proceedings in the name of the partnership.³²

Defendant(s): The defendant in Judicial Review proceedings is the public body / public office holder which made the decision that is being challenged (or which failed to make a decision where that failure is challenged), not the individual within that public body or public office who made the decision.³³

Grounds of review: There are limited grounds by which someone can bring a Judicial Review. Grounds of Judicial Review are limited to considering the lawfulness of how a decision has been made, not the merits of that decision. These include challenging a decision on illegality, irrationality, procedural unfairness or breach of natural justice (due to a sufficient breach of fairness via a tribunal member being biased, for instance).

Interested Parties: An interested party is defined as any person (including a corporation or partnership), other than the claimant or defendant, who is directly affected by the claim.³⁴

Judicial review: Judicial Review is the process by which a judge reviews the lawfulness of a decision or action made by a public body, specifically looking at how the decision was made, rather than the rights and wrongs of the conclusion reached.

Justiciability: In the present context, justiciability is the concept governing whether a public power is subject to Judicial Review or not. If a power is justiciable, then the power can be challenged via Judicial Review. If a power cannot be challenged by Judicial Review, then it is considered non-justiciable. In this view, justiciability sets the limits of the court’s authority over certain matters.

Limiting the prospective effect of a quashing order: Normally, quashing orders apply retrospectively, i.e. a quashed power has never had legal effect, including in the past. Prospective quashing limits this aspect, so that those who have relied on a challenged provision in the past can continue to rely on it.

31 The Administrative Court: Judicial Review Guide 2020, section 2.2., available here: [The Administrative Court Judicial Review Guide 2020 \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk).

32 Ibid, section 1.7.1.

33 Ibid., section 2.2.2.1.

34 Ibid., section 2.2.3.1.

Mandatory Order: A mandatory order is the order the court can make to compel a public body to act in a particular way.³⁵

Nullity: A nullity is a finding of unlawfulness to the effect that a power under review has never been used or exercised. This means that any exercise of a power has no legal effect and effectively never existed.

Ouster clauses: A mechanism by which powers can be made non-justiciable after they have previously been ruled so.

Quashing Order: A quashing order quashes, or sets aside, the decision, thereby confirming that the challenged decision has no lawful force and no legal effect. After making a quashing order the court will generally remit the matter to the public body decision maker and direct it to reconsider the matter and reach a fresh decision in accordance with the judgment of the court.³⁶

Remedies: When the claimant starts a claim, they must state in section 7 of the Claim Form what remedy they seek from the court in the event that they are successful. There are six remedies available to a successful claimant in Judicial Review proceedings.³⁷

35 Ibid., section 11.3.1.

36 Ibid., section 11.4.

37 Ibid., section 11.2.

Annex C – List of Consultation questions

Question 1: Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?

Question 2: Do you have any views as to how best to achieve the aims of the proposals in relation to *Cart* Judicial Reviews and suspended quashing orders?

Question 3: Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?

Question 4: (a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?

Question 5: Do you agree that the proposed approaches in (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?

Question 6: Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in (a) or the mandatory approach in (b) would be more appropriate?

Question 7: Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?

Question 8: Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?

Question 9: Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.

Question 10: Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?

Question 11: Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?

Question 12: Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?

Question 13: Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?

Question 14: Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply, as outlined above?

Question 15: As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?

Question 16: Is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?

Question 17: Do you have any information that you believe would be useful for the Government to consider in developing a full impact assessment on the proposals in this consultation document?

Question 18: Do you have any information that you consider could be helpful in assisting the Government in further developing its assessment of the equalities impacts of these proposals?

Question 19: Are there any mitigations the Government should consider in developing its proposals further? Please provide data and reasons.

Annex D – Stakeholder engagement

During the consultation period a significant amount of engagement with stakeholders was undertaken. It consisted of:

- Three roundtable meetings between Ministry of Justice officials and 14 academic lawyers.
- With the assistance of the Bar Council, one webinar where Ministry of Justice officials presented, and responded to questions, on the consultation proposals to an audience of around 50 barristers and one roundtable meeting between Ministry of Justice officials and a smaller group of barristers nominated by the Bar Council.
- With the assistance of the Law Society, we held one webinar where Ministry of Justice officials presented, and responded to questions, on the consultation proposals to an audience of around 55 solicitors and two roundtable meetings with smaller groups of solicitors nominated by the Law Society.
- A roundtable meeting with 11 advocacy groups, namely Liberty, Justice, Mind, Amnesty International, Public Law Project, Legal Action Group, Law Centres Network, JustRight Scotland, Child Poverty Action Group, Committee on the Administration of Justice, and Access Charity.
- Officials also engaged with Wales, Northern Ireland and Scotland government officials during and after the consultation to ensure that their perspectives were considered within the policy development process.
- In order to improve their understanding of how *Cart* Judicial Reviews work in practice, policy officials have met with members of the judiciary. This engagement was within the framework of the judiciary's guidelines for engaging with the Executive and approved by the Lord Chancellor and the Lord Chief Justice.
- Officials also met with Mikołaj Barczentewicz, of Surrey University, who shared his research on *Cart* Judicial Review cases.

Annex E – *Cart* statistical analysis

1 The total number of *Cart* Judicial Review cases brought to the Administrative Court against the Upper Tribunal (Immigration and Asylum Chamber) decisions from 1 Jan 2018 - 31 Dec 2019 was 1,249 excluding cases pending a Upper Tribunal Appeal decision. Of these, 92 resulted in the Upper Tribunal decision being quashed. In the relevant period the Upper Tribunal gave permission to 85 cases post-remittal (excluding cases pending a decision). Of the 85, to date 42 have been successful, 43 unsuccessful. 13 cases are still awaiting a decision by the Upper Tribunal.

2 In summary, on the basis of the data we are able to say that the 'success rate' of *Cart* cases is substantially lower than the average success rate for other types of Judicial Review which is typically in a range of 30% to 50%. For *Cart* Judicial Review, the 'success rate' is around 3.4% - ie the number of cases found in favour of the claimant by the Upper Tribunal in an appeal which followed a remitted grant of permission following a *Cart* Judicial Review, divided by the total number of applications for a *Cart* Judicial Review in the period in question.

Success Rates' of *Cart* Judicial Reviews

Background

1. 'Success' in Judicial Reviews is notoriously difficult to measure. The commonly accepted methodology is to look first at the number of cases recorded as 'found in favour of the claimant' at a substantive hearing, as recorded in the Civil Justice Statistics, and then to estimate and include the number of cases which were settled by the defendant or withdrawn by the claimant prior to a substantive hearing.
2. Several academic studies exist on this, and the commonly accepted figure is that between a third and half of Judicial Review claims settle in favour of the claimant. Going further than this, some studies use interviews with claimants to estimate how many felt they had gained a tangible or intangible benefit as a result of bringing a Judicial Review, regardless of whether a court found in their favour. On this measure Judicial Reviews may be thought to be successful in up to 60% of cases.
3. Measuring success in *Cart* Judicial Reviews is slightly different, as the claimant is using the Judicial Review to try to get the Upper Tribunal to hear an appeal against a decision of the First-tier Tribunal. It is generally accepted that not only the outcome of the *Cart* Judicial Review process itself is important, but also any subsequent decision of the Upper Tribunal regarding the appeal against the First-tier Tribunal.
4. This is what the IRAL panel attempted to measure, However, the data set they examined has been challenged as insufficient on several counts. Firstly, that the databases they examined

would be unlikely to have complete records of *Cart* Judicial Review cases (both in the Administrative Court and Upper Tribunal) and secondly they did not take into account that cases may be settled as a result of a *Cart* Judicial Review claim. The Government therefore agrees with respondents to the consultation that the IRAL figure of 0.22% is too low.

5. The IRAL Report's process for identifying success numbers was to look through the databases Westlaw and BAILI for all cases involving a *Cart* Judicial Review since its inception. They found 45 reports/transcripts, with 12 positive results. However, Westlaw and BAILI only record cases which set precedent in some way in terms of the judgment or case. Therefore, these reports and transcripts, and the associated judgements, only relate to small amount of the actual number of successful *Cart* Judicial Review cases during that time.

Methodology

6. Our analysis aimed to trace the outcome of every *Immigration Cart* case remitted back to the Upper Tribunal, through comparison between the Upper Tribunal's (Immigration and Asylum Chamber) internal case management data and the HMCTS ARIA database. This exercise focused on immigration cases because these make up 92% of *Cart* cases and the rate at which non-immigration *Cart* cases are given permission is extremely low (1.67% 2012-2020).
7. For this analysis, success in a *Cart* Judicial Review was defined as:
 - Permission has been given by the High Court for an application for Judicial Review of an Upper Tribunal decision on permission to appeal; and
 - The appeal has been remitted back to the Upper Tribunal; and
 - The appeal went to an appeal hearing in the Upper Tribunal and was found in favour of the claimant.
8. We firstly assessed the number of *Cart* Judicial Reviews granted permission by the High Court. CPR 54.7A(9)(b) states that permission being given in a *Cart* Judicial Review automatically leads to the Upper Tribunal permission to appeal decision being quashed, unless one of the parties requests a hearing. From 2012-2020 339 out of 6,293 *Cart* Judicial Reviews were granted permission. This equates to 5.69% (immigration) as the upper limit for potentially 'successful' *Cart* Judicial Reviews over this period – in that they have a chance of leading to the Upper Tribunal quashing the decision of the First-tier Tribunal in an appeal. Looking only at more recent years (2016-2020) the figure is 5.69% (Immigration)
9. In determining settlement rates, the Home Office settlement rate was looked at, as they are party to a number of *Cart* Judicial Review (as these often concern Immigration and Asylum). A *Cart* Judicial Review is a challenge to the decision of the Upper Tribunal and although the Home Office is an interested party it does not normally substantively engage with *Cart* Judicial Reviews. When a Judicial Review is granted permission, there is a period of time where interested parties can intervene to request a full hearing, beyond which the case is remitted to the Upper Tribunal. The Home Office do not usually intervene at this stage, meaning that the settlement rate here is negligible, and the case is remitted.

10. The Upper Tribunal (Immigration and Asylum Chamber) was able to assess the outcomes of appeal hearings following a *Cart* Judicial Review from 1 Jan 2018 to 31 Dec 2020. This was done by finding the cases remitted back to the Upper Tribunal as a result of a *Cart* Judicial Review in the OPTIC database and from manual trawl of internal case management files. The OPTIC database records the Judicial Review case number as well as the original claim ID.
11. The original claim ID was then fed into the ARIA database, which would give a return on the case ID showing the outcome of any Upper Tribunal appeal decision, or if the case was pending a decision.
12. In this way, the outcome of every case recorded as being remitted back to the Upper Tribunal could be ascertained.

Caveats

13. There is a slight disparity between the total number of *Cart* Judicial Review applications recorded by the Administrative Court (1,249) and the Upper Tribunal (1,192) in the period (1 Jan 2018 – 31 Dec 2019). We believe the reasons for this disparity are as follows:
14. The Administrative Court records a case as being in the year in which the claim was issued and the Tribunal records a case as being in the year in which the Tribunal was served with it – it is not uncommon for claimants to serve the Tribunal late, or indeed not at all, particularly if they are litigants in person. Hence there may be cases not recorded by the Upper Tribunal (particularly if the cases did not reach a permission decision) at all or would be recorded in subsequent years. An application made in 2019 to the High Court may be recorded as a 2020 case by the Upper Tribunal. Similarly, the Upper Tribunal would record cases at the beginning of the period for which the application was made before 1 Jan 2018. However, this may mean the timing discrepancy is balanced out.
15. The Upper Tribunal data only shows *Cart* Judicial Review which have outcomes or are pending an appeal decision. Data from the Administrative Court includes Judicial Reviews which are still live, and thus would not appear in the Upper Tribunal statistics.
16. Otherwise many of the cases not recorded by the Tribunal were likely to be Judicial Reviews which fell out of the system for one of the following reasons:
 - (1) struck out before the permission stage for non-compliance with the Civil Procedure Rules or court directions (for example failure to provide a Certificate of Service or file copies of the relevant appeal decisions),
 - (2) withdrawn by the Claimants before the permission stage because they obtained a fresh immigration decision or grant of leave from the Home Office,
 - (3) abandoned after the Claimants left or were removed from the UK, or
 - (4) transferred to the Upper Tribunal Judicial Review jurisdiction after the court ascertained the decision under challenge was in fact a First-tier Tribunal decision on the timeliness or validity of the appeal.

17. We consider that the Administrative Court data on the total number of applications is a more complete reflection of the number of applications, but acknowledge that this may cause a slight margin of error due to the date that cases are reported.
18. In making calculations for 'success rates' we decided to disregard data from 2020 due to the effects of the COVID-19 pandemic, and the fact that a high proportion of cases granted permission in a *Cart* Judicial Review are yet to appeal in the Upper Tribunal's data. This means that 2020 has insufficient data to make accurate calculations.
19. The calculations also disregarded any cases which are pending a Upper Tribunal decision. The number of pending cases was removed from the number of total applications and number of appeals remitted to the Upper Tribunal. This means that our calculations are solely based on 'completed' cases – ie that the Upper Tribunal has reached a judgment at an appeal hearing, or the *Cart* Judicial Review was withdrawn or dismissed at an earlier state.
20. We recognise there is no like-for-like comparison possible with other kinds of Judicial Review, but the academic consensus supports the approach of comparing a reasonable metric of 'success in a *Cart* Judicial Review' with a reasonable metric of 'success in a Judicial Review generally'. We believe a reasonable metric of success in a *Cart* Judicial Review is to have the appeal decision remitted back to the Upper Tribunal *and* for the Upper Tribunal to find the appeal in favour of the claimant when that appeal is heard. In other Judicial Reviews, academic studies tend to focus on the outcome of a substantive hearing and estimate the rate of settlement (for a specific topic or in general). The Independent Review of Administrative law examined evidence on the 'success rates' in Judicial Reviews finding there to be a general consensus of around 30-50% of claims being settled in favour of the claimant or found in their favour at a substantive hearing.³⁸

Results

21. The tables below show the total number of cases in each year which reach each stage in the High Court and Upper Tribunal, in the course of a *Cart* Judicial Review and subsequent remittal to the Upper Tribunal. A number of cases are pending an appeal decision in the Upper Tribunal, this number for each year has been subtracted from the total number of applications to the High Court for a Judicial Review, the number granted permission, and the number given permission by the Upper Tribunal following remittal. This means that the calculation for success rate only count completed cases.
22. The first table shows the progress of *Cart* Judicial Reviews in the High Court (except those pending an appeal decision in the Upper Tribunal). In the relevant years, out of the total number of applications (1249) 89 were granted permission either at an oral or paper hearing while 2 were heard at a substantive hearing. This meant a total of 92 cases were remitted to the Upper Tribunal for a permission to appeal decision.
23. The second table shows the progress of cases which were remitted to the Upper Tribunal (again except those pending an appeal decision in the Upper Tribunal). This number is 85, 7 less than were remitted. As explained above this could be due to the timing of the applications for Judicial Review and when the Upper Tribunal is served with the case. Cases may also fall away

38 Faulks et al, IRAL Report (CP 407), 176-177

or be withdrawn for other reasons. The Upper Tribunal may also decline to give permission at the remitted permission to appeal stage.

24. Of the 85 cases granted permission following a remittal, the table records how many were found in favour of the claimant at the appeal hearing, and how many were found against. The number of pending cases is also recorded.
25. 42 cases were found in favour of the claimant at their appeal hearing, taking this number divided by the number of total applications for *Cart* Judicial Reviews (1249), produces the 'success rate' for *Cart* Judicial Reviews (3.4%).

Cart - Immigration						
HIGH COURT (minus cases pending Upper Tribunal Appeal decision)						
Yearv	Total	Granted Permission	% Granted Permission	Oral Hearing	Paper Hearing	Substantive
2012	161	2	3.73%	4	157	1
2013	672	34	5.21%	1	671	2
2014	776	55	7.99%	7	768	2
2015	1159	44	4.40%	7	1151	3
2016	683	27	4.83%	6	676	1
2017	789	52	6.97%	3	786	1
2018	614	42	7.17%	2	614	2
2019	635	38	7.09%	7	638	0
2020	307	24	8.79%	3	307	0
TOTAL	5796	318	6.18%	40	5768	12
2018-2019	1249	80	7.13%	9	1252	2

Fig. 4

Cart - Immigration

UPPER TRIBUNAL - IMMIGRATION & ASYLUM (minus cases pending Upper Tribunal Appeal decision)

Year	UT Permission re-decision	% Permission Re-decision	UT appeal found in favour of claimant	% found in favour	UT Appeal found against the claimant	% found against	Cases Pending
2012	—	—	—	—	—	—	—
2013	—	—	—	—	—	—	—
2014	—	—	—	—	—	—	—
2015	—	—	—	—	—	—	—
2016	—	—	—	—	—	—	—
2017	—	—	—	—	—	—	—
2018	45	7.33%	23	3.75%	22	3.58%	3
2019	40	6.30%	19	2.99%	21	3.31%	10
2020	4	1.30%	1	0.33%	3	0.98%	4
TOTAL	-	-	-	-	-	-	-
2018- 2019	85	6.81%	42	3.36%	43	3.44%	13

Fig. 5

ISBN 978-1-5286-2793-1

CCS0621754360 07/21